Date: December 27, 1994

Case No. 94-CAA-0004

In the Matter of

RICHARD HOFFMAN
Complainant

v.

W. MAX BOSSERT
Respondent

Appearances:

Eugene Mattioni, Esq.,
Scott Schwarz, Esq.,
For the Complainant

Thomas Arthur James, Jr., Esq.,
For the Respondent

Before: Frank D. Marden
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 7622(a) of the Clean Air Act and Section 9610 of the Comprehensive Environmental Response, Compensation and Liability Act. 42 U.S.C. §7622(a) (1977); 42 U.S.C. §9610 (1980).

The Employee Protection Provision of the Clean Air Act prohibits an employer from discharging or otherwise discriminating against any employee because the employee engages in communications or activities protected under the Clean Air Act.[1]

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[1] Section 7622(a) of the Clean Air Act provides:

(a) Discharge or discrimination prohibited. No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) -

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or a proceeding for the administration and enforcement of any

The Employee Protection Provision of CERCLA prohibits an employer from firing or discrimination against any employee because the employee has engaged in activities that are subject to protection under CERCLA.[2]

On September 8, 1993, a written claim was filed with the United States Department of Labor on behalf of Richard Hoffman, Claimant, against his employer, W. Max Bossert and Boss Insulation and Roofing, Inc., Respondent, for unlawful discharge and discrimination in violation of Section 7622 of the Clean Air Act, and Section 9610 of the Comprehensive Environmental Response, Compensation and Liability Act.[3] (ALJX 1).[4]

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requirement imposed under this Act or under any applicable implementation plan,

(2) testified or is about to testify in any such proceeding, or,

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

42 U.S.C. §7622(a) (1977).

[2] Section 9610 of CERCLA provides:

(a) Activities subject to protection. No person shall fire or in any other ways discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

42 U.S.C. §9610(a) (1980).

[3] Although Claimant, in his closing argument, referred to an oral complaint with OSHA, that complaint does not appear to be part of these proceedings, in the Complaint filed with the Department of Labor, or in the Dept. of Labor's findings of October 13, 1993. Thus, I will not address the OSHA complaint.

[4] The following references will be used herein: TR for transcripts of the hearings held before me in Lewisburg, Pennsylvania, RX for Respondent's exhibit, CX for Claimant's exhibit, and ALJX for Administrative Law Judge's exhibit.

After investigating Claimant's complaint, the Department of Labor Wage and Hour Division found on October 13, 1993 that Claimant was a protected employee engaging in a protected activity within the scope of the relevant federal laws and that discrimination as defined and prohibited by these laws occurred in this case. (ALJX 3). Respondent appealed these findings by sending a telegram to the Chief Administrative Law Judge on October 15, 1993. (ALJX 4). In addition, Respondent filed an Answer on December 17, 1993. (ALJX 19). This claim came before the Office of Administrative Law Judges, pursuant to Respondent's appeal of the findings by the Department of Labor Wage and Hour Division. (ALJX 3, 4).

A formal hearing was conducted before me on December 21-22, 1993 in Lewisburg, Pennsylvania. At the hearing, both parties were represented by counsel, presented evidence, and examined witnesses.[5] After the close of the hearing, the parties were given the opportunity to take the depositions of Ronald Schwebel and Michael Hughes and to submit written closing briefs. (TR 13-15, 375).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Factual Background

Claimant began work for Respondent as a roofer in April of 1993. (TR 169). He is 37 years old and has a high school education. He resides in Milton, Pennsylvania. (TR 167).

W. Max Bossert (Bossert) is the president, owner, and sole stockholder of Boss Insulation and Roofing, Inc. (Boss) (TR 287-289) (CX 23). Boss is a roofing business involved in industrial and commercial roofing and employs 18 - 20 employees when business is good. (TR 287-289). The company does seasonal work, and in between jobs, several employees are laid off or work only partial weeks. (TR 289-290). When employees are hired, they understand that they will only be working 1500 hours instead of 2280 hours per year. (TR 290). Bossert testified that Boss has done work on asbestos roofs and asbestos has always been a problem with roofs but not all roofs have asbestos. (TR 291). He testified that there is no way to tell an asbestos from a fiber glass roof just by looking at it with the naked eye. (TR 291). Bossert testified that asbestos can only be discovered

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[5] The following exhibits were admitted into the record subsequent to the hearing: ALJX 20 - Claimant's closing argument; ALJX 21 - Respondent's closing argument; ALJX 22 - Claimant's rebuttal to Respondent's brief; ALJX 23 - the hearing transcript; CX 52 - deposition of Ronald Schwebel; CX 53 - deposition of Michael Hughes.

through an electron microscope when the felts are examined by professional labs. (TR 291-92). Roofers do not usually check because they do not have the capabilities. (TR 292).

Bossert is not asbestos certified, but he is a member of the National Roofers Association which holds seminars on asbestos. (TR 291). Boss's employees worked on asbestos roofs in 1992 - 1993, which involved three prison jobs and the Navy shipyards. (TR 292-294). As a result of these jobs, Boss is familiar with Department of Environmental Resources and Labor and Industry's procedures concerning asbestos removal. (TR 294).

In 1993, Boss was awarded a contract to re-roof the Danville High School. (TR 294). E.I. Associates was the Danville School District's architect for the re-roofing project and prepared the specifications for the work to be performed. (TR 56, 64). The architect's role is to define the specification for handling the roof, removal of the roof, the new type of roof they want installed, and then he drew the pictures and prints required. The architect gave Boss the specification of the job, and there was nothing in the specifications or statement by anyone involved in the project that asbestos was present. (TR 294). Boss's job was to remove the existing built up roof which was four-ply asphalt roof and install a new rubber adhered roof. (TR 59, 295) (CX 19). The job began in July of 1993. (TR 252).

In the spring of 1993, prior to bidding on the job, Bossert visited the High School and observed the top of asphalt roof felts. (CX 19, p. 23). Marlin Hummel (Hummel), the school district's Director of Buildings and Grounds and Resident Inspector, showed Bossert the building. (TR 58-59). Hummel testified that he did not say anything about whether asbestos was present in the school because he did not know. (TR 59). Bossert and Rick Klees, one of Boss's employees, testified that Hummel assured Klees that the school was asbestos free. (TR 252, 295). However, Boss did not perform any tests to determine if the existing roof felts contained asbestos. (CX 19).

Michael Hughes, President of Central Pennsylvania Abatement Corp., also visited the Danville High School in 1993 to inspect the roof and put together a bid proposal. (CX 53). Hughes was certified as an asbestos inspector, contractor, and supervisor for abatement. (CX 53). He examined the roof and concluded by its appearance that it contained asbestos. (CX 53). He reported his conclusion by telephone to E.I. Associates, but based on the response from E.I. Associates, he concluded that the specifications would not be changed so as to require that the re-roofing be handled as an asbestos project. (CX 53). He declined to bid on the job because he could not bid on the job as an asbestos project and be competitive with other bidders. (CX 53). He estimated that the price would be about 10 to 15 percent higher for asbestos removal. (CX 53).

Until August 12, 1993, the general procedure used by Boss's employees in the re-roofing project at the Danville High School was to cut the existing roof into cubes of approximately 30 inches square, pry up the pieces of cut roof with a dozer, load them into a wheelbarrow, and dump them off the edge of the building into a dumpster. (TR 129, 178-180) (CX 19). The employees did not use a hose to wet the roofing material down as it was being torn off of the roof. (TR 131). (TR 131, 190) (CX 19). The roof pieces became frayed as they were torn off and dumped into the dumpster. (TR 179). Some pieces missed the dumpster or were spilled off the sides. (TR 126, 190).

Partial asbestos labels first began appearing on Monday, August 9, 1993, but they were not legible. (TR 180). On Tuesday, August 10, 1993, additional labels were discovered. Dave Lenig, an employee of Boss who was asbestos certified, mentioned to his foreman, Steve Bechdel, that he thought that the roof felts contained asbestos. (TR 95, 110, 120). Lenig showed Bechdel a label from one of the roof felts, which contained the word asbestos, but the label was torn and unreadable. (TR 95, 138). Bechdel acknowledged seeing labels around that date, but said that they were cut and difficult to read so Bechdel took no action. (TR 97-98, 110, 138). 120). Lenig became concerned and called his former employer at lunch time to find another job. (TR 95). Lenig's former employer also gave him the telephone numbers of the agencies to contact for the prevailing wage and, the asbestos. (TR 111).

On August 10th, Claimant testified that he discussed the labels with the other employees, including Bechdel, Lenig, Chad Smith, Mike Hufnagle, and Brian Osman. (TR 181). With the exception of David Lenig, who has an asbestos certification, the other employees simply ignored the labels. (TR 91, 181).

On August 11, 1993, it rained and there was no work. (TR 96, 98, 183). Claimant accompanied Lenig to a pay telephone at a doughnut shop and provided Lenig with change so that Lenig could call his former employer and asked him to notify the proper authorities. (TR 183). Lenig then called his former employer and talked with his old foreman. He asked him to call the agencies and provide notice so that the site could be checked for asbestos. (TR 96, 98). Based on Lenig's telephone call, Lenig and Claimant were both under the impression that Lenig's former employer would notify the appropriate persons about the potential asbestos problem. (TR 98-99, 114, 183). Lenig went back to work for his former employer the next Tuesday. (TR 30, 103).

On August 12, 1993, no state inspectors were present at the school when Claimant and Lenig arrived. The roof tear off started as normal. (TR 98-99, 183-184). The employees present on August 12, 1993 were: Steve Bechdel, Richard Hoffman, Mike Hufnagle, Paul Mehallow, Chad Smith, Brian Osman, and Dave Lenig.

(TR 119, 148, 181) (CX 20) (RX 4). Bechdel was the foreman. (TR 119, 184). Lenig was the only worker on the roof on that date with asbestos certification. (CX 19) (TR 91, 186-187). Claimant's job was to cut and tear off the roof felts. As the day progressed, the workers found more labels which were intact and indicated that there was asbestos on the roof. (TR 99, 184). Claimant testified that he gave the labels to Bechdel and asked Bechdel to stop the job. (TR 184). He told Bechdel that somebody had to notify the school, and volunteered to do so. (TR 185). Lenig was present and confirmed that Claimant volunteered to go to the school office. (TR 99-100). Bechdel instructed Claimant to get a school supervisor so Bechdel could notify the school. (TR 99, 121, 185). Bechdel and Lenig confirmed that Claimant was acting with Bechdel's approval. (TR 99, 121).

Claimant then went to the school office, spoke to a secretary, Laura McGonnell, and asked to speak with the superintendent of schools. (TR 61, 187 and 215). The secretary told Claimant that the superintendent was unavailable. (TR 61, 187, 230-231). Claimant mentioned that there was a problem on the roof and was insistent on speaking to the superintendent. (TR 187-188). Hummel overheard the conversation and told Claimant that he was in charge of the roof and would handle the problem. (TR 61, 188, 231-233). Claimant refused to speak to Hummel and allegedly was rude, rowdy, and obnoxious to both the secretary and to Hummel. (TR 215 and 232). Hummel testified that Claimant was rough which upset the secretary. (TR 62). When Claimant left the office, Hummel followed Claimant to the roof, where they met Bechdel. (TR 61, 121, 188-189, 233). Bechdel told Hummel that they found some labels that said asbestos and that a possible problem with asbestos might exist. (TR 61-63, 121, 189).

Next, Bechdel contacted his office and left a message for Bossert to come to the school. (TR 122). Hummel contacted the school district's architect, E.I. Associates, and the school district's asbestos consultant, Ron Schwebel, who is asbestos certified as a building inspector, management planner, and design consultant. (TR 61) (CX 52). Schwebel arrived at the Danville High School at about 1:30 pm on August 12, 1993. (TR 65) (CX 52). He took five samples of the roofing material, including one sample of the roofing material from a truck located about thirty feet from the school building, and he took these samples to an EPA certified laboratory. (TR 67) (CX 52).

Bossert was in Harrisburg, Pennsylvania from August 8, 1993 until the morning of August 12, 1993. (TR 297). When he returned to Lewisburg on August 12, he called his office and spoke with Kristine Beaver, his office manager. (TR 298) (CX 20). Beaver told Bossert about the reports of asbestos at Danville High School. (TR 298). Beaver called the Department of Environmental Resources and the Labor and Industry to report the

asbestos problem. (TR 260-261, 298-299). James Archenbault, with DER, told Beaver to submit a written application. (TR 261). Beaver testified that she filled out a DER form on Thursday (August 12, 1993) but needed more information from Bossert and needed his signature, which he signed early Friday morning. (TR 263). She then sent the form to DER. She also filled out an asbestos notification form for Labor and Industry on Thursday. (TR 263-264). Bossert signed the form on Friday, and she mailed it that day. (TR 264, 308).

Bossert arrived at the school a little after Schwebel on Thursday, August 12, and met with Claimant, Bechdel, Hummel, and Schwebel. (TR 298-299). He learned at that time Claimant and Bechdel had discussed the asbestos labels earlier that morning, and that Claimant had talked to the school secretary and Hummel. (TR 298-299, 309).

While on the roof at Danville High School, Bossert spoke with Claimant about Claimant's conversation with the school district officials. (TR 190, 301-302). Claimant, Bechdel, and Bossert all testified that this conversation took place. (TR 122-123, 190, 298-299). Claimant testified that Bossert came over and told him that he did not know how to communicate, and that Claimant should not have gone to the school district, but rather should have come to him. (TR 190, 295). Bechdel similarly testified that Bossert criticized Claimant for acting improperly and not contacting Bossert first. (TR 122-123). However, Bechdel explained that what Bossert meant by his statement was that the employees acted properly by stopping the job, shutting things down, and notifying people, but Bossert would have liked to have been contacted first. (TR 139-140). Bossert, in his deposition, acknowledged admonishing Hoffman for the manner in which he spoke to the school district. (CX 19). Bossert testified that he had no concern or objection that the school was notified about the asbestos problem because that was the standard procedure when asbestos is found, but he was concerned about the way Claimant approached the school. (TR 309-310). Bossert testified that he was aware of other instances that Claimant came across as rude, rowdy, and rough when talking to people. (TR 311-312).

Before returning to his office, Bossert instructed his employees to return to the shop for a meeting at the end of the day. (TR 100) (CX 19). In addition, Bossert again admonished Claimant and said Claimant could not go back to work at the Danville High School because he had upset the school officials and should take the day off. (TR 191-192). Bechdel recalled Bossert saying that the employees should have come to Bossert first, and that Bechdel should have gotten off the roof and told the school officials. (TR 123). Lenig recalled Bossert saying that the school district did not want Claimant back on Friday and that he should be given a day off. (TR 101). Claimant testified

that Bossert initially told him to take the day off, but Claimant stated that he wanted to work so Bossert told him he would find him another job. (TR 192). Lenig also recalled Bossert telling Claimant to report to work on Friday and he would find another job for him. (TR 101). Bossert told Lenig to report to work on Friday and he would be required to wear asbestos gear to remove the roof decking. (TR 101).

On Thursday night, August 12, 1993, Claimant called Pat Kelly, a Field Investigator with the Pennsylvania Department of Labor and Industry ("L&I"). (TR 193). Claimant provided Mr. Kelly with information of the events that had taken place earlier that day at the Danville High School job site. (TR 193). Kelly stated that he would visit the site. Claimant asked Kelly to bring along someone from the Pennsylvania Department of Environmental Resources ("DER") when he visited the school. (TR 193).

The following morning on August 13, 1993, Claimant reported to work at about 7:00 am and was told by Bossert that there was no work for him. (TR 194, 315) (CX 19). Claimant recalled Bossert saying there was no work for him and advising him to go on unemployment. (TR 194). According to Bossert's testimony, he told Claimant there was no work for him that day because only qualified asbestos and rubber workers could go back to Danville High School job that day. (TR 312-315). Employees with certified asbestos removal were involved in the tear off process that Claimant normally worked, and the other employees were certified applicators that laid the rubber on the roof. (TR 313). Claimant was not certified in asbestos removal or, was he a certified applicator. (TR 314). Training for certified applicators is normally done in Jan., Feb., and March, and Claimant started working in early summer and had not had a chance to go to school. (TR 314, 332-341).

Further, Claimant also had the least seniority and experience of Boss's employees. (TR 108, 265, 331-332). Bossert testified that Claimant was not assigned to the job at the Brockway school because that job was ongoing and was about to close, and there were already 5 or 6 men on the job so he was not needed there. (TR 345-346).

After returning home, Claimant called Gus Mucha of OSHA. (TR 194). Claimant told Mr. Mucha that he suspected that he had been fired from his job, and described the events that had taken place on August 12 and 13, 1993. (TR 194). Mucha advised Claimant to return to work on Monday and said that he would investigate the matter. (TR 194).

At about 9:00 am on August 13, 1993, Schwebel received the analytical results from the laboratory, which showed asbestos levels ranging from 8 to 30 percent in the roof material sampled. (TR 302) (CX 39, 52). Because EPA considers roofing material with over one percent asbestos as "asbestos containing" material, it was clear to Schwebel by August 13, 1993 that the roofing material was "asbestos containing material" for purposes of the EPA regulations. (CX 52).

The highest level of asbestos from the samples collected and analyzed, which was 30%, was reported in the sample of roofing material collected from the truck. (CX 52, 39). After receiving the sample results, Schwebel called Bossert and faxed him the test results. (CX 52, 19).

During his conversation with Bossert, which took place before noon on August 13, 1993, Schwebel instructed Bossert that the employees on the roof should be certified and provided with protective clothing and respirators. (CX 52). On Friday, an air monitoring was to be done on an representative area of the roof. (TR 302). Schwebel stated that if the air conditioning monitoring results showed levels of asbestos in the air below the regulatory action level established by OSHA of 0.1 fiber per cubic centimeter, then it would not be necessary for the employees to wear protective clothing and respirators, although asbestos certification would still be necessary. (CX 52).

Lenig testified that he worked on Friday with Ken Smith and the rest of the crew except Claimant. (TR 101-102). Lenig and Ken Smith, both wore asbestos gear because they were the only ones who were certified in asbestos and allowed to remove the decking from the roof. (TR 102, 302-303). They would tear off the roof in different areas and conduct air monitoring samples which were sent to a lab for testing. (TR 75, 302). The other certified employees were performing the detailing, which included applying the rubber on the roof, on the other end of the roof. (TR 102, 126).

Patrick Kelly of L&I visited the Danville High School on August 13, 1993. (TR 71) (CX 52). Kelly stated that he was there to follow up on 13 complaints that he had received and to speak with Bossert and Hummel to determine if any of Boss’s employees were certified in asbestos. (TR 71-72). Kelly also spoke with Schwebel about the asbestos certifications of Boss’s employees. (CX 52). Schwebel reported this conversation to Bossert on August 13, 1993. (CX 52, 50).

Schwebel spoke with Mr. Lawrence of L&I on August 14th or 15th. (CX 52). Lawrence confirmed to Schwebel that Boss’s employees working on roof removal had to be certified as asbestos workers, and Boss’s supervisor on the roof would have to be certified as an asbestos supervisor. (CX 52). Schwebel reported

this conversation to Bossert verbally and in a subsequent letter dated August 20, 1993. (CX 52, 50).

On Sunday, August 15, 1993, Claimant again called Pat Kelly of L&I, and provided Kelly with additional information of the events that had taken place at the Danville High School. (TR 197). Kelly told Claimant that he had gone to the school and done some monitoring tests and tear offs. (TR 197).

On Monday, August 16, 1993, Claimant reported to work at about 7:00 am. (TR 197, 315). Bossert again told Claimant that there was no work because he did not have a place to put him. He advised Claimant to go to the unemployment office. (TR 198, 315-316). Next, Claimant followed Bossert and asked several times whether Bossert was firing him. (TR 197-198, 315-316). Claimant testified that Bossert then nodded his head. (TR 194, 198). Bossert claims that he replied, "no, you are laid off." (TR 315-316). After returning home, Claimant telephoned Gus Mucha of OSHA a second time and reported what happened. (TR 198). Gus Mucha told Claimant that he would investigate the matter. (TR 198).

Bossert received a telephone call from Gus Mucha around August 16th as a result of Claimant's complaints to Mucha. (TR 308-309, 345). Gus Mucha's notes show that he contacted Bossert, but that Bossert could not offer any additional information, except to repeat "Hoffman should have spoken to me first, he shouldn't have gone to the District office." (CX 1). Bossert testified that he made this statement. (TR 310, 352). However, he explained that what he meant by this statement was the manner in which Claimant handled the situation. The statement had nothing to do with asbestos. (TR 352-353). Mucha's notes go on to state "I then suggested to Bossert that he assign Claimant to another 'prevailing wage rate' job in Williamsport to resolve this matter. Bossert declined the suggestion." (CX 1). However, Bossert testified that he did not have a prevailing wage job in Williamsport. (TR 352).

Air sample results, collected on the roof during a tear off on Friday, the 13th, were also received by Boss on Monday, August 16. (TR 303). These results showed ambient air asbestos levels below the action levels which trigger requirements for masks and protective clothing or moon suits. (TR 303). Based on these results, DER directed Boss to wet down the roofing, but to otherwise handle it as normal. (TR 303). The job could continue with the appropriate people. (TR 303, 305, 341). The agencies wanted all the workers to be certified; although the employees were not required to wear suits and respirators. (TR 341-342). During that week, Boss was trying to get the job going again, but the company did not have enough qualified employees to do asbestos removal. (TR 317).

The project was then halted for about a month. (TR 266). Work was temporarily halted because Boss did not have enough employees who had certifications from asbestos school. (TR 304-305) (CX 19). About two weeks after August 12, Bechdel, Brian Osman, Chad Smith, and Mike Hufnagle were sent to asbestos school at Boss's expense of about $800 per employee. (TR 39, 124, 148) (CX 19). Boss did not offer to send Claimant to asbestos school. (TR 201) (CX 19, p. 60).

On August 18, 1993, James Orr, an air quality inspector at DER, conducted an asbestos complaint investigation of the Danville High School. (CX 9) (TR 76). He met with Hummel and discussed handling procedures and disposal methods of the asbestos roofing material. (TR 75-76). Hummel testified that Orr was interested in the removal of the material from the roof and whether it was being handled properly, and Orr did not give any indication that it was not being handled properly. (TR 75-76). Hummel stated that Orr did not require any changes in the project. (TR 77). On September 9, 1993, when the roofing work resumed, Orr conducted a reinvestigation. (CX 9). His investigation concerned possible violations of the asbestos regulations due to complaints. (CX 9, 24, 28).

On August 18, 1993, Claimant also provided information about the asbestos problem at the Danville High School to the Milton Standard, a local newspaper, by giving a deposition at the newspaper's office. (TR 220-221, 223).

As a result of the newspaper story, a lot of hysteria was created. (TR 305-306). Every time Boss would go back on the job on a weekday basis, with Hummel's approval, there would be complaints from inside the building concerning airborne particles. This caused the School District to stop the roofing job. (TR 87). The district stated that the job was stopped until the district could determine what was going on, even though the test results indicated that the workers could continue working on the roof without causing any danger to anyone. (TR 86-87, 305-307). Due to the hysteria in the Danville area at the time, and the way the teacher's groups were, the school district decided to wait until the following summer to finish the job. (TR 325-326).

I also note that on August 25, 1993, Bossert wrote a letter to Gus Mocha of OSHA, in which he explained his discussions with the Claimant as follows:

> After hearing all of the details from the school district and from other employees, I told Mr. Hoffman not to go back to work on Friday, August 13 at the school. I told him I had nothing else for him to do at any other job for that Friday. Also, we then discussed whether he should come to work or not on Monday. I

> told him if I had another job for him on Monday he could work on that job. However, Mr. Hoffman then called the newspaper, etc. and created quite a lot of hysteria as a result of the asbestos. Mr. Hoffman did not report for work on Monday, the 16th, and has not been back since the 13th.

(CX 3).

At the hearing, Bossert recalled saying in August: "How could I have him (referring to Hoffman) back. He destroyed that job." (TR 325). Bossert explained that he was referring to Claimant's communications to the newspaper about the asbestos problem. He explained that he was referring to the hysteria that was caused as a result of his reporting the incident to the newspaper. The job would probably have continued on because Boss had the capabilities to finish after everyone was trained. (TR 325). (TR 325-326). In referring to Claimant's communications with the newspaper, Bossert testified, "... had he not gone to the newspaper, we probably would have been back on the job and continuing on." (TR 325).

As a result of the Danville School job closing, Boss laid off several employees. (TR 326). The Danville School job was a large project which involved about half of the work force of this company, and when the job closed, Boss reduced its work force. Beaver and Bossert both testified that Boss's business decreased after the Danville job. (TR 269, 307). Tom Alexander was laid off shortly after the 12th, and Ken Smith was laid off a couple of weeks after the 12th. Chad Bossert, Steve Venios, and Dave Lenig no longer worked for Boss after the week of August 21. (TR 267-68). None of these employees were replaced by new employees. (TR 134).

Some of Boss's employees went on to other jobs that were not wage jobs or were private jobs that did not pay as much. (TR 326). Bechdel testified at the hearing that he worked all through September, October, and November. (TR 127). He also testified that Chad Smith, Mike Hufnagle, Brian Osman, and Paul Mehallow all worked regularly for Boss through the months of September and October. (TR 132).

By September 8, 1993, Claimant filed an additional written complaint with the DOL pursuant to the employee protection provisions of the Clean Air Act and CERCLA. (ALJX 1). This complaint was investigated by DOL Wage and Hour Division, resulting in the findings on October 13, 1993 that Claimant was a protected employee engaging in a protected activity within the scope of the relevant federal laws and that discrimination as

defined and prohibited by these laws occurred in this case. (ALJX 3) (TR 199). Boss received this letter on October 15, 1993. (TR 283). That same day, he filed an appeal by sending a telegram to the Chief Administrative Law Judge. (TR 283) (ALJX 4).

On September 9, 1993, the workers were called back and work resumed on the roof at the Danville High School for a few weekends, but only on weekends. (TR 32). In addition to having asbestos certified employees, Boss was required to handle and dispose of the roofing material as asbestos. This meant that he had to notify the landfill about the dumping procedures and perform some air monitoring, as well as line the dumpster used to collect and store the asbestos prior to shipping the material to the landfill. (CX 19 p. 65-66). When work resumed on the school's roof, OSHA conducted an inspection in response to Claimant's prior oral complaints of August 13th and 16th, 1993. (CX 4). OSHA cited Boss for failing to investigate the Danville High School roof thoroughly enough before starting the re-roofing project. (CX 4) (TR 327).

The work at Danville High School continued on Saturdays for about three to six weeks until a certain area was reached. (TR 81, 305-306) (CX 19 p. 63-64). Once the expansion joint was reached, Boss's employees tied off the area for the winter, and the re-roofing work stopped until next summer. (TR 81, 305-306) (CX 19 p. 63-64). At the time of the hearing, the re-roofing job was 46 percent complete. (TR 325).

As a result of the Danville job closing, Boss's work force was reduced due to the lack of work. (TR 152, 269, 307, 326). Several workers were either laid off or no longer worked for the company. (TR 153-155, 265-269, 326). Beaver, Bechdel, and Bossert all testified that Claimant had the lowest seniority, and that he was one of the employees laid off due to lack of work. (TR 133-134, 265, 326). Bechdel testified that Claimant was not needed after August 12th so he was laid off. (TR 127). The job did not require as many people because the workers were only doing detailing and finishing up. (TR 136).

I further note that on September 15, 1993, Claimant had bicep surgery due to an injury he had received in June while working for Boss. (TR 199-200, 271, 329). Although he was injured in June, Claimant worked through August 12th and was capable of doing his job. (TR 200, 329). Claimant received compensation under worker's compensation, beginning September 15, 1993. (RX 6) (TR 208, 271-272, 329). On October 8, Beaver contacted Dr. Hahn, Claimant's doctor, to determine if Claimant could return to work doing modified activities. (TR 272) (RX 9).

Dr. Hahn determined that Hoffman could return to work on light duty and sent a letter on October 19 to Boss. Beaver sent a letter to Hoffman on October 18th about coming back to work on October 21st. (TR 199, 284) (CX 12). Hoffman returned to work on October 21, 1993. (TR 273-274).

Claimant reported to work on October 21, 1993. (TR 155). He was assigned to work on the light duty program and remained on light duty work for about one month. (TR 200-201) (CX 20 p. 14-15) (CX 13). He was paid $204 per week while on light duty work and did not receive any worker's compensation during this period. (TR 208).

By memorandum dated Novemebr 27, 1993 and signed by Bossert, Claimant was notified that he was "laid off as of the above date due to lack of work." (TR 201) (CX 23). He has not worked since November 27, 1993. (TR 201).

II. Complainant's Prayer for Relief

Claimant seeks a finding that he was unlawfully discriminated against in violation of CAA and CERCLA. He also requests the entry of an order directing Boss to do the following:

(1) reinstate Claimant to his prior employment status as it existed prior to August 12, with no loss of job seniority or other privileges;[6]

(2) offer Claimant the same opportunity for training in asbestos and rubber roofing as was offered to the other employees;[7]

(3) pay Claimant back pay in the amount of $2097[8];

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[6] Respondent's attorney stated that Claimant, an employee of Boss, engaged in light duty work because of worker's compensation restrictions in October and November. (TR 38). He was subsequently laid off. (TR 41).

[7] Respondent's attorney also stated that if Claimant was physically qualified, then Boss would send him to get trained in asbestos. (TR 38). However, if Claimant is not qualified at the moment, then Boss would send him to asbestos training once he was qualified. (TR 315).

[8] Hoffman's back pay of $2097 was calculated by adding the following amounts:

(1) back pay of $175 for August 13, calculated by

(4) pay costs and expenses, including attorneys fees and witness fees, incurred in connection with bringing this claim in the amount of $31,259.12.[9]

III. The Law

Claimant, in a whistleblower case, initially has the burden of proving a prima facie case by a preponderance of the evidence. To prove a prima facie case, an employee must establish each of

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multiplying the 8 work hours reported on the time sheets for other employees working on the Danville High School on August 13 by the stipulated prevailing wage rate of $21.90 per hour for the Danville High School job; (TR 174) (RX 4)

(2) back pay of $734 for August 15-19, calculated by multiplying the 33.5 work hours reported on the time sheets for other employees working at the Brockway School that week by the prevailing wage rate of $21.90; and

(3) back pay of $1,188 for the weeks of August 23rd and 30th and September 6th and 13th, calculated by multiplying the average weekly wage of $296.90 reported on Hoffman's workers compensation form by the four weeks that Hoffman was without work before becoming eligible for workers' compensation. (RX 6) (TR 272).

The average wage on the workers compensation form was used for computing compensation during this last period because it provided the most reliable minimum figure available, even though Hoffman's actual compensation would have been higher due to some prevailing wage work at $19 to $22 per hour. (TR 169, 331). According to Beaver, approximately 75 percent of the work performed by Boss was prevailing wage work, and Hoffman worked on the prevailing wage jobs 40 to 50 percent of the time. (CX 19, 20).

[9] I note that the attorney fees in this case are unnecessarily high. I do not understand how an attorney can justify spending $31,000 in a $2,000 case. Most of the attorney's fees appear to be investigating, discussing, or copying the rules concerning asbestos. The presence of asbestos on the roof was never an issue in this case. Further, I note that one of the attorneys donated his services which would apparently reduce the total legal cost. Attorneys should keep their fees within a reasonable range and not run up bills unnecessarily. The whistleblower provisions only allows Claimant to recover expenses that are reasonably incurred in connection with the proceeding. The $31,000 of expenses in this case does not appear reasonable.

the following elements:

(a) That the employee engaged in protected activity;

(b) That the employer knew that the employee engaged in protected activity;

(c) That the employer took some adverse action against the employee; and

(d) The employee must present evidence sufficient to at least raise an inference that the protected activity was the likely reason for the adverse action.

Sellers v. Tennessee Valley Authority, 90-ERA-14 (Sec'y April 18, 1991) Decisions of the OALJ and OAA, Vol. 5, No. 2, March-April 1991, p. 165-166. See also Thompson v. Tennessee Valley Authority, 89-ERA-14 (Sec'y July 19, 1993) Decisions of the OALJ and OAA, Vol. 7, No. 4, July-Aug. 1993, p. 316-319. See generally Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981).

Once Claimant has established his prima facie case, Respondents have the burden of presenting evidence that the alleged adverse action was motivated by legitimate, nondiscriminatory reasons. Id.; See also Lockert v. United States Dept. of Labor, 867 F.2d 513, 519 & n.2 (9th Cir. 1990). If Respondent articulates a legitimate, nondiscriminatory reason for his action, Claimant must establish that Respondent's proffered reason was not its true reason, but rather, a pretext. Id.

The Respondent need not persuade the court that it was actually motivated by the proffered reasons, but it is sufficient if the Respondent's evidence raises a genuine issue of fact as to whether it discriminated against the Claimant. To accomplish this, the Respondent must clearly set forth, through the introduction of evidence, the reasons for the Claimant's rejection. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981).

IV. DISCUSSION

A. Protected Activity

To establish the first element of Claimant's prima facie case, he must prove that he has engaged in protected activity. The primary purpose of the employee protection provisions are to ensure that violations of the act are reported. Marshall v. Intermountain Electric Co., 614 F.2d 260, 262 (10th Cir. 1980). Reporting violations of environmental statues internally to one's

employer is protected activity under the whistleblower provisions. Guttman v. Passaic Valley Sewerage Comm'rs, 85-WPC-2 (Sec'y Mar. 13, 1992). An informal safety complaint to a supervisor is sufficient to establish protected activity. Samadurov v. General Physics Corp., 89-ERA-20 (Sec'y Nov. 16, 1993). Further, a claimant's questioning of his supervisor about an issue related to safety constituted protected activity. Crosier v. Portland General Elec. Co., 91-ERA-2 (Sec'y Jan. 5, 1994); Nichols v. Bechtel Constr., Inc., 87-ERA-44 (Sec'y Oct. 26, 1992).

In Passaic Valley Sewerage Comm'rs v. United States Dept. of Labor, 992 F.2d 474 (3d Cir. 1993), the Claimant was employed by the Respondent, a water treatment facility, as the head of a lab that analyzed water samples pursuant to an ad valorem user charge system in which the users of the facility took their own water samples. Over a period of years, the Claimant reported extensively to PVSC officials that the user charge system violated the FWCPA. The claimant was subsequently terminated from his employment at PVSC. The Third Circuit held that the "statute's purpose and legislative history allow extension of the term 'proceeding' to intracorporate complaints." Accordingly, the Third Circuit affirmed the findings of the Secretary that the Claimant had engaged in a protected activity.

In this case, during the tear off process of the roof at the Danville High School, partial labels were found on Tuesday, August 10, which raised suspicions about the presence of asbestos; however, the labels were torn and unreadable so it was not clear whether asbestos was present in the roof materials. (TR 118-120, 180-182). There were discussions between the workers, which included Steve Bechdel, Dave Lenig, Chad Smith, Mike Hufnagle, Brian Osman, and Richard Hoffman, about the labels. (TR 181).

Steve Bechdel, the foreman for Boss on the Danville High School job, testified that Dave Lenig found something on the 10th. (TR 120). However, Bechdel could not recall specifically whether Lenig told him about the possibility of asbestos or whether it was another employee. He stated that he believed that Lenig came and showed him a piece of paper with the word "asbestos" cut through it. Dave Lenig testified that he told Bechdel about the possibility of asbestos on August 10th. (TR 95, 110).

There was no work on August 11, 1993 and on Thursday, August 12, Claimant and the other workers again found labels on the roof. (TR 154). Claimant told Bechdel that the school should be notified due to the safety of the children and the workers, and he volunteered to go to the school office. (TR 184-185). With Bechdel's permission, Claimant went to the school office to get a school supervisor. (TR 121). Lenig affirmed that one of the

workers showed the labels to Bechdel and that Claimant went to the school office. (TR 99-100).

Based on the above, I find that Claimant's communications with his supervisor, Bechdel, about the asbestos and the possibility of its danger to the children in the area as well as his insistence on notifying the school's officials constituted an informal safety complaint to a supervisor and is a protected activity.

Further, Claimant argues that communicating with government agencies about the asbestos problem is a protected activity. Communicating with governmental officials about potential health hazard are protected communications. Marshall v. Commonwealth Aquarium, 611 F.2d 1 (1st Cir. 1979); Donovan v. George Lai Contracting, Ltd., 629 F. Supp. 121, 123 (W.D. Mo. 1985). In this case, Claimant called Pat Kelly, who is a Field Investigator with the Pennsylvania Dept. of Labor and Industry, on Thursday evening, August 12th and on August 15th. He explained the events that occurred on August 12th at the Danville High School. (TR 193). Claimant told Kelly to bring an official from DER when he inspected the school. (TR 193, 197). He also contacted Gus Mucha, who is with OSHA, on August 13th and 16th and explained the finding of asbestos and the events that occurred. (TR 194, 198).

Accordingly, I find that Claimant's telephone calls to these government agencies are also protected activity because they were direct contacts with state and federal officials, who were responsible for investigating asbestos violations at the school. I find Claimant engaged in protected activity when he contacted the federal and state government agencies.

B. Employer's knowledge of the protected activity

To establish the second element of Claimant's prima facie case, he must prove that his employer knew that he had engaged in a protected activity. Claimant told his foreman, Bechdel, about the asbestos and the need to notify the school district. Also, several employees were present when Claimant told the foreman about the need to contact the school's officials. (TR 185-186).

Accordingly, I find that Respondent was aware that the Claimant engaged in protected activity because the foreman was aware of Claimant's safety complaint. Also, Bossert, the owner of the company, testified that he knew that Claimant notified Bechdel about the labels and subsequently went to the school office to get a school supervisor. (TR 309). Hence, I find that Boss knew that Claimant engaged in protected activity.

Furthermore, Bossert testified that he was aware that Claimant had contacted authorities because Gus Mucha, who is with

OSHA, contacted him on Saturday or Monday about a complaint that had been filed by Claimant regarding the Danville school job. (TR 309). Also, Bossert testified that he was aware on August 16th that Claimant had contacted some agencies due to Claimant's statements that he had contacted some people. (TR 308). In addition, Bossert claimed that he had also heard this through other employees. (TR 308-309). However, Bossert noted that these were the same agencies, L&I and DER that Beaver, who is his business manager, had contacted by telephone and written communications on Thursday afternoon and Friday about the asbestos problem independent of any knowledge that Claimant had contacted these agencies. (TR 298). Hence, I find that Boss knew that Claimant engaged in protected activity by contacting government agencies.

C. Adverse Action

To establish the third element of Claimant's prima facie case, he must prove that Respondent took some adverse action against him. In this case, Claimant alleges that the adverse action against him was the unlawful discharge and discrimination in the form of being laid off or fired from his job as well as the loss of opportunity to attend asbestos school. Bossert told Claimant on Friday, when he arrived for work, that he did not have a job for him and that he should go to the unemployment office. (TR 194, 313-315). Bossert explained that Claimant was neither certified in asbestos nor a certified applicator in laying rubber. (TR 313-315). Also, on Monday, when Claimant reported for work at the office, Bossert reiterated that he did not have a job for him based on the same reasons as Friday. (TR 198, 315-316). Bossert told Claimant that he was laid off and that the should go to the unemployment office. (TR 315-316). On the other hand, Claimant testified that he was fired, but he admits that Bossert did tell him to go to the unemployment office. (TR 194, 198, 209, 212).

I note that the federal laws at issue do not distinguish between being fired or laid off in terms of discriminating against the employee. Accordingly, I find that Claimant has established that Respondent took an adverse action against him because he was laid off or alternatively fired.

D. Causal Nexus between the Adverse Action and the Protected Activity

To establish the fourth element of Claimant's prima facie case, Claimant must at least raise an inference that the protected activity was the likely reason for the adverse action.

Claimant alleges that because he engaged in protected activities, such as contacting school officials and government agencies, Boss refused him the opportunity to work and did not

offer him the opportunity to attend asbestos school. Claimant points out several inconsistencies in Respondent's case to prove his burden that the adverse action against him resulted from his protected activities.

First, Respondent's attorney called three witnesses, Stacy Keefer and George Ferlazzo from a bank, and Laura McGonnell, the school secretary, in an attempt to elicit testimony about Claimant's attitude as being rowdy, rude, and obnoxious. (TR 230-250). Claimant argues that Boss expended a great deal of time and effort to establish Claimant's offensive attitude, but then denied that Claimant's attitude had anything to do with the decision not to offer him work after August 12. (TR 326-327, 334-336). Claimant alleges that this type of testimony is inherently inconsistent and confusing at best when weighed with Boss's claim that the only reason Claimant was not provided with work after August 12 was because of lack of work. I agree.

During the hearing, I questioned Respondent's attorney about the relevance of the evidence regarding Claimant's attitude. (TR 332-339). Bossert consistently testified that Claimant was laid off due to lack of work. (TR 314, 326, 336). Bossert instructed Claimant to apply for unemployment compensation. (TR 315-316). Claimant admitted that Bossert told him to apply for unemployment. (TR 198). Respondent's attorney stated that he was in error regarding this issue of Claimant's attitude, and that this was a "Freuding" issue. (TR 334-335). He stated that Claimant's attitude had nothing to do with his being laid off.

Accordingly, I find that Claimant was laid off due to his low seniority and lack of work. The evidence concerning Claimant's attitude is a red herring. I do not find that Claimant's attitude has any relevance to the protected activity of notifying the school or his being laid off. Hence, I find that this evidence is inappropriate and irrelevant in this case.

Second, Claimant alleges that Bossert's repeated statements that the school district was upset with Claimant are inconsistent with Bossert's claimed reason for not sending Claimant back to Danville High School on August 13, 1993. Claimant and Lenig testified that Bossert told Claimant at the office meeting on Thursday evening that he could not work on Friday because the school district was upset with him and did not want him back on the job. (TR 101, 190-192). Also, Claimant cited a statement of one of Boss's employees taken by the DOL investigator on September 23, 1993, in which the employee stated that on August 13, Bossert told Hoffman that he could not use him on the Danville school job anymore because the school was not happy with his actions in the school office on August 12. (CX 5). Finally, Claimant argues that Hummel testified that he never told Bossert not to send Claimant back to the school. (TR 78-79).

However, I note that Hummel did state that he sent a letter to Respondent explaining the events of August 12 and Claimant's actions. It is understood that different events and actions can be perceived differently by different people. I find that this letter explaining the actions of Claimant on Thursday could have been interpreted by Bossert to mean that the school district was upset with Claimant. Further, I find that the statement on August 23, 1993 by one of Boss's employees is unpersuasive because it appears leading where the first part of the statement is a narrative and the later part indicates that the employee was prompted.

Further, I find that Bossert was not upset that the school was notified because he stated that this is the normal procedure when asbestos is found; however, he was upset with Claimant about the manner in which Claimant tried to notify the school. This is the sole reason Bossert kept telling Claimant that he should not have gone to the school office and that he did not know how to communicate. The question is whether being upset constituted a likely reason for the adverse action.

Bossert testified that Claimant was laid off due to lack of work. (TR 326). Claimant did not work on Friday because he was not qualified. (TR 340-341). He was not certified in asbestos or in the application of rubber. (TR 336, 340). Bossert testified that he had no work for Claimant on Friday because Schwebel requested that only asbestos certified workers be allowed to do tear off on Friday which is what Claimant was doing on the school roof. Also, Claimant could not do the rubber work that was being done on the other part of the roof because Claimant was not certified. The manufacturers require that a worker be certified in application of rubber for the job to be guaranteed. (TR 336-337). Bossert testified that Claimant was an unskilled roofer and did not know the detail work so he was used as a laborer in doing tear off work. (TR 331-332). There were two people doing tear off who were asbestos certified. There were three people doing the detail work, who were certified in application of rubber; however, Bossert was not clear about the qualifications of the one other worker, who worked on Friday, Chad Smith. (TR 343). However, Chad Smith and all the rest of the workers on the Danville roofing job, had more seniority than Claimant, which was the reason why Claimant was the first employee on this job to be laid off. (TR 265). There were six Boss employees on the roof on Friday the 13th, who had been working on the roof during the week. Six employees constitutes a normal crew on a job. (TR 336-337).

Based on the foregoing, I find that Claimant has not raised an inference that the adverse action (lay off) was a result of his protected activity. I find that Boss did not lay off Claimant for contacting the school officials or any of the regulatory agencies. Claimant was laid off for lack of work;

i.e., the job was shut down. Further, Bossert testified that Claimant did not work on the Danville school on Friday because he was not qualified. Claimant was not certified in asbestos or applying rubber on the roof, and he had the lowest seniority of all the workers. Therefore, I find that Claimant did not work on Friday because of his seniority and qualification limitations.

Third, Claimant alleges that Bossert's repeated complaints that Claimant should have come to him first are inconsistent with Bossert's stated reason for not having Claimant work at the Danville High School job on Friday or the following week. I note that Claimant and Steve Bechdel both testified that Bossert told Claimant that he handled the situation incorrectly, and that Claimant should have gone to Bossert first. (TR 122-123, 190). Further, Gus Mucha's notes from his conversations with Bossert on August 16, 1993 quote Bossert as saying: "Hoffman should have spoken to me first, he shouldn't have gone to the District office." (CX 1).

I also note that Bossert admitted that he made this statement to Mucha; however, he explained that he was referring to the manner in which Claimant handled the situation. (TR 310, 352-353). Claimant should not have approached the school office in the manner that he did. (TR 310). I further note that Bossert stated that he had no objection or concern that Claimant notified the school because that is the standard procedure when asbestos is found. (TR 309-310, 352-353). Moreover, Bechdel explained that when Bossert made the statement that he should of been contacted first, Bossert meant that the workers did the right thing by shutting down the job, but he would have liked to have been contacted first. (TR 122-123, 140).

Based on the above and my findings in the prior argument, I find that Claimant has not raised the inference that the adverse action resulted from his protected activity. The reasons set forth above concerning Claimant's non qualifications and his low seniority, coupled with the overall reduction in work force of Boss, are much more credible and believable. The simple fact that Bossert was "upset" does not convince me in this situation that it was any way connected with his lay off. I find the testimony of Bossert and Bechdel credible because both their explanations of Bossert's statement are consistent. Further, I find that Claimant's communications with the government agencies did not cause the adverse action. Respondent contacted the DER and L&I before Claimant. Also, Claimant was already laid off when Respondent found out about Claimant's contact with these agencies.

Fourth, Claimant alleges that Bossert's repeated references to Claimant's contacts with the local newspaper further undermine Bossert's claim that Claimant was laid off because lack of work, and corroborate the alternative conclusion that Claimant was not given work because of his protected communications with the media. For example, in Bossert's letter of August 25, 1993 to Gus Mucha of OSHA, Bossert wrote: "I told him if I had another job for him on Monday he could work on that job. However, Claimant then called the newspaper, etc., and created quite a lot of hysteria as a result of asbestos. Mr. Hoffman did not report for work on Monday the 16th, and has not been back since the 13th." (CX 3). Claimant argues that this letter shows that Bossert was upset by his communications with the media. Claimant also argues that it further undermines Bossert's credibility by falsely claiming that Claimant did not show up for work on Monday, August 16th.

Further, Claimant argues that at the hearing, Bossert still appeared to be upset by Claimant's communication with the media. Bossert admitted saying, several weeks after August 12th: "How could I have him (referring to Hoffman) back. He destroyed that job." (TR 325). Bossert explained that he was referring to Claimant's communications to the newspaper about the asbestos problem. Also, Bossert testified that had Claimant not gone to the newspaper, Boss's employees would probably have been back on the job continuing on because Boss had the capabilities to finish the job after everyone was trained. (TR 325).

I note that in his letter to Mucha on August 25th, Bossert went on to say that the "asbestos problem had gotten way out of hand in the media, etc.. Most of the tests are in at this time and the appropriate agencies have investigated. The job should start up again next month." (CX 3). Bossert also testified that most of the above statements were made after Monday, the 16th. (TR 316-317). During the week that the newspaper headlines came out, Bossert testified that he was trying to get the job going again. (TR 317). Every time Boss would go back on the job during the week, there would be complaints from inside the building concerning airborne particles. The complaints and the hysteria caused the school district to decide to close the job until the next summer. (TR 325-326).

Bossert testified that as a result of the Danville job ending, he had to lay off a lot of employees. (TR 326). Respondent argues that this job involved a large roof which was being worked on by almost half of the work force of a small company. Then the job was "closed down" which caused the small company to reduce the work force by half. Claimant had the least

seniority and experience of any worker in the company which is the reason he was one of the first to be laid off. The income of the company dropped considerably as evidenced by the payroll records. Hence, Respondent argues that it was the business turndown that caused Claimant to be laid off.

Based on the above, I find that Claimant has not meet his burden. I find that Bossert's testimony about the nature of his statements regarding the newspapers is credible. Bossert's statements concerning the newspapers are based on the complaints of the students and teachers in the school which arose out of the hysteria that was created by the media and subsequently caused the job to close. Bossert's statements deal with the consequences of the media reaction on the roofing job. Hence, it was not the reporting of the asbestos prior to his lay off that caused the job to close, but rather it was the effect of the reporting to the newspaper after his lay off.

Therefore, I do not find that Claimant's contact with the media caused the adverse action of Claimant being laid off. The media contact and frenzy did not occur until after August 16th, after he was laid off. Even if the Claimant's communications with the media are protected activities, I find that there is no casual nexus between the adverse action of Claimant being laid off and the "possible" protected activity of communicating the asbestos problem to the media.

Fifth, Claimant alleges that there were jobs available for him on August 13th and after. Claimant argues that, in addition to the Danville High School job, another job at Brockway Area School District was ongoing around August 12. (TR 266). In his deposition, Bossert admitted that he had another crew working on a job at the Brockway School District on August 16, 1993, and that Claimant was capable of working on the Brockway job on that date. (CX 19 p. 58). However, I note that when Bossert was asked whether Claimant could have worked on that job, he stated yes. But, he explained that the job was about to close, and he had other full crews working on that job. (CX 19 p. 58).

Further, Claimant argues that Bossert's testimony at the hearing and the time records for the week of August 15-21 show that at least three employees were assigned to the Brockway School District job during that week. (TR 281, 345-346) (EX 3). I do not find this statement persuasive because as stated above, Bossert testified that he did not send Claimant on that job because there was already enough people in the crew working on the Brockway school job, and the job was almost complete. (CX 19) (TR 345-346).

Therefore, I find that Claimant has not meet his burden of proof with this evidence. Bossert testified that Claimant was laid off due to lack of work. Although Boss had a job after

August 16th at the Brockway school, the job was ending and there were already enough people on that job. Also, because Claimant had the lowest seniority, it is logical that Boss did not remove people already on that job and replace them with Claimant.

In addition, Claimant argues that during the week of August 15th - 19th, all of the seven employees present at the Danville job on August 12th, with the exception of Dave Lenig who quit and Claimant, worked for Boss at least a partial week. (TR 151) (CX 20). Additional testimony established that work was also available in September, October, and November. Bechdel testified at the hearing that he worked all through September, October, and most of November. (TR 127). He further testified that Chad Smith, Hufnagle, Osman, and Mehallow all worked regularly for Boss through the months of September and October. (TR 132).

Respondent argues that Beaver testified that none of the employees on the Danville job worked more than a hour on Monday. Bossert reasoned that because the results from the tests performed on the Danville roof were not received until after 11:00 am, the workers did not work at the school that day. Bossert indicated that the work on the Danville was going to resume on Tuesday with the appropriate people. (TR 341). The government agencies wanted all of the workers to be certified. (TR 341-342, 344-345) (CX 50). Claimant was not certified. At that time, Boss did not have enough workers who were asbestos certified to make a crew to be able to continue on with the job on Tuesday. (TR 317). As a result, a few of the employees worked only three hours on Tuesday on the Danville job. (RX 3). The employees on the Danville job, with the exception of Claimant, Lenig, and Ken Smith, went for asbestos training. Claimant was not sent to the school because he did not contact the office after August 16th. Also, Claimant had the lowest seniority and not all of Boss's employees were sent for asbestos certification. (TR 124-125, 128, 136).

Also, as a result of the Danville job closing, some of the employees were laid off, and some of the employees went on to other jobs that were not wage jobs or were private jobs that did not pay as much. (TR 326) (RX 3). Bossert and Beaver both testified that business decreased after the Danville job. The gross wage report shows a decrease in the amount of the payroll which supports their testimony. (RX 5).

Further, Respondent argues that Claimant lists the employees who continued to work in September, October, and November, but he fails to mention the names of the employees who were laid off and did not work at all during this time. There were several other employees besides Claimant who did not work after the Danville and Brockway jobs. Some of the employees who were laid off or who did not work were Dave Lenig, Ken Smith, Tom Alexander, Steve Venios, and Chad Bossert. (TR 328). Specifically, Ken Smith was

laid off a couple of weeks after the 12th, and Tom Alexander was laid off shortly after the 12th. (TR 134). Also, Chad Smith was gone for 6 weeks so he was not working during this time. (TR 134). None of these employees were replaced by new employees. (TR 134). The employees listed above, who continued to work, had more seniority, more expertise or were certified in other areas.

I further note that Claimant fails to mention that he had surgery on September 15, and was unable to work for a period of time. While Claimant was recuperating, he was paid worker's compensation. Boss still considered him to be an employee. (TR 315, 329). In fact, Boss, through Kristine Beaver, contacted Claimant's doctor on October 8, to inquire whether Claimant could return to work doing light duty tasks. (RX 9). After obtaining the doctor's approval for Claimant to return to work, Beaver sent Claimant a letter instructing him to report to work on October 21, 1993. (CX 12).

Based on the above, I find that Claimant has failed to raise an inference that his lay off from Boss had anything to do with his engaging in protected activities. Claimant was laid off along with several other employees because there was not enough work. Claimant had the lowest seniority and experience. Boss's business dropped, and as a result, only a few employees were still employed. Further, Claimant had surgery and was unable to work for a period of time, but he returned to work after he had recuperated.

As stated above, I find that Claimant was not offered work on August 13th and 16th because he was not qualified to perform the tear off or the detailing of the roof. Also, the other ongoing job at the Brockway School was almost finished, and there were already enough people on the job. There were no other jobs available on August 13th and 16th besides the Danville and Brockway school jobs.

V. Conclusion

Based on all of the above evidence, I find that Claimant has failed to raise an inference that the adverse action of Claimant being laid off was a result of his engaging in protected activities such as contacting the school officials, government agencies, or the newspapers. Therefore, I find that Claimant has failed to establish a prima facie case because he has failed to prove a casual nexus between the adverse action and the protected activities. Hence, having found that Claimant has not met his threshold burden of establishing a prima facie case, his complaint must be dismissed.

RECOMMENDED ORDER

For the reasons stated above, I recommend that the complaint of Richard Hoffman v. W. Max Bossert (94-CAA-0004) be dismissed in its entirety.

FRANK D. MARDEN
Administrative Law Judge

Camden, NJ
FDM/hb

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).